CHONG KAH MUI & ANOR.

v.

YENG SHIEW SENG

HIGH COURT MALAYA, JOHORE BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 53 OF 1981]
15 JANUARY 1985

TORT: *Negligence - Liability - Contributory negligence - Effect.*

The claim arose out of a motor accident on a small laterite road leading off the main road into an estate. The accident was between a motorcycle driven by one Tam See Weng ("the deceased"), who died as a result of the injuries received, and a motor bus driven by the defendant. The action was brought by the dependants of the deceased.

The sole issue before the Court was one of liability relating to the negligence and/or contributory negligence of the deceased and/or the defendant in respect of the accident.

Held:

[1] The deceased motorcyclist was wholly to blame for the accident.

[2] In the absence of rebutting evidence of any inherent improbability the Court must accept the defendant's version of how the accident occurred.

[3] The Court must be guided by the evidence before it as the issue of negligence is a question of fact.

[Claim dismissed with costs. Judgment for defendant.]

Cases referred to:

Croston v. Vaughan [1937] 3 All ER 249
Henry Trading Co. Ltd. v. Harun [1966] 2 MLJ 281
Chan Kok Sing & Anor. v. Khoo Lan [1966] 1 MLJ 171

For the plaintiffs - Subra Naicker; M/s. Subra Naicker & Co.
For the defendant - S.P. Veloo; M/s. V.P. Nathan & Co.

JUDGMENT

Mahadev Shankar J:

This is a claim for damages arising out of a motor accident which took place on 12 May 1977 at about 7.15 p.m. on a small laterite road leading off the main road into Sedenak Estate, Air Bemban, Johore. The accident was between a motorcycle JB 2651 driven by one Tam See Weng and a motor bus No. JH 4053 driven by the defendant Yeng Shiew Seng. As a result of this accident Tam See Weng, hereafter referred to as the deceased, sustained severe injuries to which he succumbed two days later.

He left his widow and 6 children surviving him all of whom were dependent upon the deceased for their support, maintenance and care.

According to the writ the plaintiff filed this action on 11 May 1980 but the action does not appear to have been registered until the following year as Suit No. 53 of 1981.

At the commencement of the trial the parties agreed that on the basis of 100% liability the general damages would be RM31,000 and special damages RM1,390 excluding any interest to which the plaintiff may become entitled.

The sole issue before the Court was therefore one of liability relating to the negligence and/or contributory negligence of the deceased and/or the defendant in respect of this accident.

The plaintiffs were not able to call any eye-witnesses to this accident whatsoever. The Court was therefore left with the sketch-plan and key, the police report made by the defendant and the defendant's testimony to assist it in arriving at a finding as to how this accident could have happened.

The salient facts which can be extracted from this material, are as follows:

The deceased was proceeding on his motorcycle from Sedenak Estate towards the main road. The defendant was approaching from the other direction. The accident took place at a bend. At this point the road was 18 feet wide at the place where the deceased's motorcycle came to rest and 19 feet wide at the rear of the defendant's motor bus at the place where it came to rest. The front wheel of the deceased's motorcycle was 3 feet 6 inches from the verge of the road on the deceased's off-side. In other words the motorcycle was 5 feet 6 inches into the wrong side of the road. The rear wheel of the motorcycle was protruding about one foot into its correct side.

The off-side front wheel and the off-side rear wheel of defendant's bus was 9 feet from its off-side verge. In other words both off-side wheels were on the centre of the road. According to the Certificate of Examination of the bus the damage to it was on its front mid portion. The sketch plan suggests that the bus was 7 feet wide and if the bus was travelling along the same line of direction before the impact occurred, the position here was that the deceased motorcyclist had a berth of 9 feet in which to pass the bus but instead appears to have gone about 3 feet 6 inches into the wrong side of the road when the impact occurred. It is noted that the front wheel of the motorcycle where it came to rest is also 3 feet 6 inches from the wrong side.

It is against the back-drop of the sketch plan and key that one should weigh the credibility of the defendant's testimony.

In his police report made a few hours after the accident the defendant said that he was travelling at about 20 m.p.h. on the estate road when he saw the motorcycle approaching him. The material portion of his report is to the effect that he saw the motorcycle about 40 feet away. It was a bit fast and was moving from the side to the centre of the road. He stopped his motor bus near the side of the road but the motorcycle came straight on and collided into the front of his bus.

In his evidence in Court the defendant also said that he was driving at about 20 m.p.h. but that he had his head lamps on. He saw the on-coming motorcycle about 40 feet away. It was on his side of the road when he first saw it but the motorcyclist suddenly swerved to his side. He was unable to swerve to the left as there was a drain there. He braked immediately but a collision took place.

Contrary to the submission of Counsel for the plaintiffs, I am unable to see that there is any material discrepancy between the defendant's police report and his evidence in Court.

The crux of this case is whether the defendant had left the deceased with enough room to pass him safely. Plaintiff's Counsel is obviously in error when he submits that the rear off-side of the bus was about 6 feet from the wrong side of its road. There is nothing in the sketch plan to suggest that the bus was at any time encroaching into the deceased's side of the road.

Plaintiff's Counsel has also sought to infer from the blood marks found on the road about 6 feet from the deceased's near-side that the probabilities are that the impact took place either at or about the middle of the road or more likely on the deceased's side of the road. With this submission I am unable to agree.

Croston v. Vaughan [1937] 3 All ER 249 was cited as authority by plaintiff's Counsel for the proposition that if the evidence did not definitely indicate that the impact took place on the defendant's side of the road then negligence ought to be apportioned on a 50-50 basis as the Court should find in the absence of such positive evidence that the collision had taken place in the middle of the road.

Counsel for the defence relied on the cases of *Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281 and *Chan Kok Sing & Anor. v. Khoo Lan* [1966] 1 MLJ 171.

For myself I would prefer to be guided by the evidence before me as the issue of negligence is a question of fact and in the absence of rebutting evidence of any inherent improbability I must accept the defendant's version of how this accident occurred. That evidence clearly showed that there was ample room for the deceased's motorcycle to pass and that the collision occurred somewhere on the defendant's side of the road. We must add to this the fact that the defendant had his head-lights on and on an estate road at night the deceased would have had ample notice of the defendant's approach.

The difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that the deceased motorcyclist was killed in this accident and this prejudice is bound more or less to reflect on the question of the culpability of the defendant and gives rise to false issues which tend to cloud judicial vision.

The preferred approach in such a case seems to be to scrutinize the evidence of the defendant with the greatest possible care since the deceased is not here to speak for himself. I have done this but notwithstanding the sympathy the Court feels for the dependants of the deceased, I am compelled to the conclusion that the deceased motorcyclist was wholly to blame for this collision.

Accordingly there will be judgment for the defendant. This claim is dismissed with costs.

Also found at [1985] 2 CLJ 43